No. 09-530

In The Supreme Court of the United States

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, ET AL.,
Petitioners,

v.

ROBERT M. NELSON, ET AL.,
Respondents.

On Writ of Certiorari to The United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF CONSUMER DATA INDUSTRY ASSOCIATION, THE NATIONAL ASSOCIATION OF PROFESSIONAL BACKGROUND SCREENERS, REED ELSEVIER INC., AND THE NATIONAL ASSOCIATION OF SCREENING AGENCIES IN SUPPORT OF PETITIONERS

CHRISTOPHER A. MOHR*
MICHAEL R. KLIPPER
MEYER, KLIPPER & MOHR, PLLC
923 15th Street, N.W.
Washington, D.C. 20005
(202) 637-0850
chrismohr@verizon.net
Counsel for Amici Curiae

* Counsel of Record

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Federal Statutes and Regulations

State Statutes

INTEREST OF THE AMICI*

Amici are companies that engage in background screening and associations that represent the interests of such companies. *Amici* companies offer background screening services to private employers and public entities, including fire departments, public housing authorities, and administrative agencies. Their screening services often involve the use of open-ended questions similar to those that the Ninth Circuit found to be constitutionally questionable in this case.

The Consumer Data Industry Association ("CDIA") is an international trade association that represents more than 200 companies that engage in background screening on behalf of public and private clients, for purposes such as prevention of fraud, assessment of credit risk, evaluation of prospective employees and tenants, locating witnesses and non-custodial parents, and apprehension of fugitives. Its members also conduct investigations on behalf of public and private employers.

The National Association of Professional Background Screeners ("NAPBS") represents over 600 pre-employment background screening firms across the United States. Its members provide pre-

---

* *Amici* file this brief with the written consent of all of the parties, which has been lodged with the clerk of this Court. No counsel for a party authored this brief in whole or in part, and only those entities listed on the cover have contributed financially to its preparation.

employment background screening information to public and private entities, who use that information to decide whether or not to extend job offers to prospective employees, or to rent apartments to prospective tenants. NAPBS clients are among the more than 88% of U.S. companies that perform background checks on their employees.

Reed Elsevier Inc. is a publisher of information products and services for the business, professional and academic communities. Its LexisNexis business unit conducts background investigations on behalf of private and public employers.

The National Association of Screening Agencies is a not-for-profit association. Its members screen both tenants and employees for tens of thousands of landlords who provide rental housing to hundreds of thousands of residents. A significant percentage of the landlords and rental units served are administered under HUD and/or state public housing authorities, with specific legal screening requirements. Both the safety and affordability of the rental units they provide depends on being able to discover all relevant risk factors in the screening process, and they ask open-ended questions to do so.

SUMMARY OF ARGUMENT

Amici are entities that screen prospective employees and tenants for both public and private clients. As part of that process, they ask open-ended questions. The Ninth Circuit, however, preliminarily enjoined the asking of such questions assuming that merely asking them is likely to cause constitutional harm. The Ninth Circuit was wrong.

First, in *amici*'s experience, the asking of such questions is a routine and necessary part of a reasonably prudent application process. *Amici* regularly pose open-ended questions similar to those condemned by the appellate court when they conduct employment and tenant screenings on behalf of government and private entities. The Ninth Circuit's denunciation of open-ended questions would deprive employers and landlords of important information as they strive to make intelligent and informed employment and tenant-related decisions.

Second, the act of posing open-ended questions to prospective employees and tenants causes no harm. Such harm would flow from the misuse of the information garnered from such questions. The record is devoid of any such misuse and federal laws—particularly the Privacy Act and Fair Credit Report Act—exist to prohibit the retention of irrelevant information and proscribe the unauthorized use of relevant information.

Third, the Ninth Circuit's ruling could well disrupt the functioning of state, local and municipal governments that routinely run employment and tenant screenings. Affirmance could well result in a

flood of litigation against state and local governments by those claiming that they were impermissibly denied housing or employment because the government obtained adverse information through questions that were "too open-ended."

I. OPEN-ENDED QUESTIONS ARE ROUTINELY USED IN EMPLOYMENT AND TENANT SCREENING

Amici and/or their members are organizations that conduct background screening for government and private entities, or supply information for such screening. Their clients include state and local government entities, such as public housing authorities, fire and police departments, and administrative agencies. The background screenings in which *amici* are involved include open-ended questions similar to those contained in Form 42.

The Ninth Circuit incorrectly held that the plaintiffs in this case were likely to prevail on their claim that the government violated the constitution by engaging in the "vague solicitation of derogatory information" through asking open-ended questions. *See Nelson v. NASA,* 530 F.3d 865, 880-881 (9th Cir. 2008). It found that such questions are not "narrowly tailored" to any legitimate state interest, *id*. at 881, and therefore are unconstitutional. The Ninth Circuit seems to have assumed that merely asking the question causes constitutional harm.

That assumption is wrong. First, in *amici*'s experience, open-ended inquiries and requests of this

type are routine and necessary parts of employment and tenant screening. Second, with respect to either type of information, the only harm that could possibly come to the plaintiffs would occur if the information was misused, and there is no evidence in this case that any such harm has or is likely to occur. The plaintiffs are protected by federal laws that prohibit the retention of irrelevant information and proscribe the unauthorized use of relevant information. No constitutional violation can possibly have occurred in this circumstance.

A. Barring the Asking of Open-Ended Questions Deprives Employers and Landlords of Necessary Information

Private and public entities employ *amici* to investigate prospective employees, volunteers and tenants and *amici* will ask open-ended questions regarding a particular job applicant, volunteer, or prospective tenant. *Amici*'s customers will provide them with a script consisting of questions that they want answered, and *amici* will then contact relevant sources of information such as prior landlords, employers, and references, and attempt to gather the requested information.

There are good reasons for permitting open-ended questions that the Ninth Circuit did not appear to factor into its decision. In its opinion, the appellate court appeared to focus entirely on the government's interest in security. *See NASA,* 530 F.3d at 881 (noting that low risk personnel pose a low threat to NASA). Although we agree with the government that security interests are certainly

present in this case (see Pet. Br. at 37), the Ninth Circuit ignored the broader interests that the government has when it acts as an employer. As this Court has recognized, the decision to hire an employee contains many intrinsically subjective decisions. *See Engquist v. Or. Dep't of Agric.,* 128 S. Ct. 2146, 2157 (2008) (acknowledging that the government has broad managerial discretion in making personnel decisions). The appellate court's conclusion that the constitution compels the government to ask only narrowly tailored questions requires the government to know specifically what information it is looking for when screening an applicant. Given the number of considerations that a hiring decision entails, that level of omniscience is unattainable.

The entire point of the open-ended question is to discover that information which the employer would not be likely to discover through targeted inquiries. For example, a reference may have formed high opinions of the applicant due to volunteer work, similar off-the-job interests, and other interactions that would never appear on a person's *curriculum vitae*. In addition, even if *amici* could ask every conceivable "narrowly tailored" question, there would be no one on the other end of the phone to respond. Sources of information typically have limited time to answer questions from potential employers or future landlords. Requiring each and every question to be "narrowly tailored," as the Ninth Circuit has, to these legitimate subjective interests would render these interviews an impossible task.

Amici therefore routinely ask open-ended questions that might give information about a candidate's suitability. The following list contains questions that were both actually asked in the course of *amici's* background screening investigations, and are representative of the kinds of questions that *amici* are asked to pursue in the context of background investigations that they conduct:

- "Is there anything you would want a prospective employer or landlord to know about this applicant?"
- "What distinguishes this applicant from other employees you worked with?"
- "Describe the applicant's character."
- "Do you consider this person to be trustworthy? If no, explain."
- "Do you have any reason to question this person's honesty or trustworthiness?"
- "Do you have any adverse information about this person's Employment, Residence or Activities concerning Violations of the Law?"
- "Do you have any adverse information about this person's Employment, Residence or Activities concerning Other matters? Explain."

- "Do you know if [sic] any other conduct relating to an assessment of potential untrustworthiness and/or unreliability? If yes, explain."

- "Describe applicant's reputation."

When such questions are asked by employers and landlords, the people answering them do not see them as reflecting the existence of any individualized suspicion about the subject of a screening investigation. The fact that an employer asks about drug use, inappropriate behavior, or "anything else" does not mean that it believes the applicant has any such problems. The exercise of an ordinary employer's prudence by the government in asking these open-ended questions causes no constitutional harm.

II. BOTH PRIVATE AND PUBLIC SECTOR BACKGROUND SCREENING OCCURS AGAINST A BACKDROP OF LEGISLATION THAT SAFEGUARDS PERSONAL PRIVACY

The Ninth Circuit's concern about the asking of open-ended questions appears to flow from the fear that the information obtained will be misused. The mere potential that the government might misuse some of this information is not a reason to bar the asking of the question as a matter of constitutional law. The fact that petitioner might use these answers to make a bad employment or tenant decision might raise constitutional questions if it were going to use them to engage in

discrimination against a protected class, for example, or to disseminate it for an impermissible purpose or in violation of some statutory obligation. Here, however, there is no evidence of any such misuse either having occurred or being likely to occur in the future. In view of the usefulness of these inquiries, therefore, the danger of misuse should be addressed not by prohibiting the government from gathering the information, but by restricting its unauthorized use. That is precisely what Congress has done.

Both private and public background screening commonly occur against a backdrop of legislation designed to protect personal privacy. When a hardware store, housing authority, fire department, or other entity retains *amici* to ask questions like those listed above for employment and housing purposes, that activity constitutes preparation of an "investigative consumer report," regulated by the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq*.[1] The FCRA permits private employers to

---

[1] More specifically, the FCRA regulates the activities of "consumer reporting agencies" which it defines as "any person which, for monetary fees, . . . regularly engages in whole or in part in the practice of assembling or evaluating . . . information on consumers for the purpose of furnishing consumer reports to third parties." 15 U.S.C. § 1681a(e). "Consumer reports," in turn, are defined as "any written, oral or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness . . . character, general reputation, personal characteristics or mode of living which is to be used or collected in whole or in part for . . . employment purposes." 15 U.S.C. § 1681a (d)(1)(B). An "investigative

employ others to investigate potential hires, while at the same time implementing quality control standards over the use of the data, limiting the purpose and scope of the disclosure, and providing rights to challenge and correct the information.[2] The government, in addition to being subject to the FCRA in many cases, is also limited by the Privacy Act, 5 U.S.C. § 552a, and other statutes.[3]

---

consumer report" constitutes "information on a consumer's character, general reputation, personal characteristics, or mode of living… *obtained through personal interviews* with neighbors, friends or associates… or others . . . who may have knowledge concerning any such items of information." 15 U.S.C. § 1681a (e) (emphasis supplied).

[2] *See, e.g.*, 15 U.S.C. §§ 1681(a)(3)(B), 1681b(f) (barring employers from commissioning investigations except for permitted purposes); id. §§ 1681d, 1681b(b)(1)-(2) (requiring an employer who plans to gather information via interview (e.g. compile an investigative consumer report) not only obtain the applicant's written consent to its preparation, but also specifically inform him that his character will be investigated); *id.* §§ 1681d(b)(4) (requiring information obtained through personal interviews to be verified or be the best source of information); *id.* § 1681m (requiring non-public record information to be re-verified after a certain time frame if re-used); *id.* §§ 1681i, 1681c(f) (providing rights to consumers in the event of disputed information); *id.* § 1681e(b) (requiring procedures to ensure "maximum possible accuracy").

[3] The FCRA does not apply to consumer reports generated for a national security investigation. 15 U.S.C. § 1681b(b)(4). Other statutes limiting the use of the kind of information gathered in this case include 42 U.S.C. § 1437d(t); 42 U.S.C. § 290dd-2 (prohibiting use of drug treatment records in criminal proceedings and the dissemination of such records).

The Privacy Act operates as a rough analog containing its own quality, disclosure, and enforcement provisions. Unauthorized disclosures of information are punishable by civil and, in egregious cases, criminal liability.[4] The government must also discard information that is irrelevant to the government's decision. *See* 5 U.S.C. § 552a(e)(1). *See also id.* § 552a(e)(5) (requiring maintenance of records in a way that ensures accuracy, relevance, and fairness to the individual). If the subject of a report believes that the government has inaccurate information about her, she may challenge the accuracy of that information and, if inaccurate, have it removed from her file. *See* 5 U.S.C. §§ 552a (d)(3), (g)(1) (permitting civil cause of action to amend record).

The Ninth Circuit's ruling creates the anomalous situation where *amici* may, under the FCRA, lawfully collect potentially relevant information relating to "character, general reputation, or mode of living," 15 U.S.C. § 1681a(e), on behalf of private entities, and have the government *constitutionally* be prohibited from doing the exact same thing. That result makes little sense, particularly when (a) the unauthorized use and disclosure of that information is guarded by a statute that protects the individual from unfair uses of the information, and (b) the legitimate interests of

---

[4] *See* 5 U.S.C. § 552a(g), (i) (providing civil and criminal penalties for willful disclosure of covered information to those not authorized to receive it).

the government in having an efficient and suitable workforce are the same as—if not greater than—those of private employers and landlords that lawfully and routinely seek out such information through the screening process.

III. AFFIRMANCE OF THE NINTH CIRCUIT RULING WILL SERIOUSLY DISRUPT THE FUNCTIONING OF STATE AND LOCAL GOVERNMENTS

The panel's holding has implications well beyond the four corners of this case. Affirming the lower court's decision could "jeopardize the delicate balance governments have struck between the rights of public employees and "the government's legitimate purpose in 'promot[ing] efficiency and integrity in the discharge of official duties, and [in] maintain[ing] proper discipline in the public service.'" *Engquist*, 128 S. Ct. at 2156, (citing *Connick v. Myers*, 461 U.S. 138, 150-51 (1983) (quoting *Ex parte Curtis*, 106 U.S. 371, 373 (1982)); *see also HUD v. Rucker*, 535 U.S. 125, 134-35 (2002) (rejecting the argument that the government in its capacity as a landlord effecting a no-fault eviction violates the Due Process Clause).

State, local, and municipal governments routinely run background screens on employees and tenants, subject, like the federal government, to laws that regulate the dissemination of personal information acquired in that screening to varying

degrees.[5] That screening also routinely occurs in the context of public housing projects at the federal level.[6] The creation of a privacy right in the absence of any showing of harm from unauthorized disclosure would result in a flood of disruptive litigation against state and local governments by those claiming that they were impermissibly denied housing or employment because the government obtained adverse information through questions that were "too open-ended." Such a result eviscerates this Court's "common-sense" notion "that government offices could not function if every employment decision became a constitutional matter." *Engquist,* 128 S. Ct. at 2156 (citation omitted).

---

[5] *See, e.g.,* Mass. Gen. Laws § 66A(1), (2) (placing limits on use of information); Cal. Civil Code § 1798 *et seq.*; Minn. Stat. §§ 13.04-05 (same); N.Y. Pub. O. Law § 94 (same); Ohio Rev. Code Ann. § 1347.05 (mandating that state agencies take "reasonable precautions" to "protect personal information"); Ind. Code § 4-1-6-2 (same); Minn. Stat. §§ 13.04-.05 (same); N.Y. Pub. O. Law § 94; Ohio Rev. Code Ann. § 1347.05 (mandating "reasonable precautions" be taken to "protect personal information"); Fla. Stat. § 110.1127(d) 2 (listing the use of information obtained to screen potential public employees for any other purpose as a misdemeanor); Col. Rev. Stat. § 24-37.5-701 to 707 (mandating the creation of "interdepartmental data protocols" to protect personal information from release to, or use by, unauthorized persons).

[6] *Cf.* 24 C.F.R. § 5.851 *et seq.* (describing permissible considerations when determining admissibility into federally assisted housing).

CONCLUSION

The judgment of the court of appeals should be REVERSED.

Respectfully submitted,

Christopher A. Mohr*
Michael R. Klipper
Meyer, Klipper & Mohr, PLLC
923 15th Street, N.W.
Washington, D.C. 20005
(202) 637-0850
chrismohr@verizon.net
Counsel for Amici Curiae

* Counsel of Record

May 27th, 2010